Marzaidi bin Mohammad (acting as a guardian/next friend and litigation representative for Muhammad Muhriz bin Marzaidi) & Anor v Mohamed Affendi bin Khairuddin

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-629–08 OF 2019
RAJA AHMAD MOHZANUDDIN SHAH JC
26 JUNE 2023

Civil Law Act — Damages — Dependency claim — Whether plaintiffs had cause of action under ss 7 and 8 of the Civil Law Act 1956 given that plaintiffs refused to sue tortfeasor for damages for deceased's death — Whether plaintiffs' action statute-barred — Civil Law Act 1956 ss 7, 7(5) & 8 — Montreal Convention 1999 article 35

Civil Procedure — Action — Cause of action — Determination of plaintiffs' entitlement to compensation based on faraid certificate — Whether civil court had jurisdiction — Whether plaintiffs had cause of action that could be pursued in civil court

Civil Procedure — Parties — Proper plaintiffs — Substitution of plaintiff — Amendment of writ and statement of claim to substitute original second plaintiff who had passed away — Whether amended writ was a nullity as it was not issued in the name of the Yang di-Pertuan Agong — Whether non-compliance curable under O 1A of Rules of Court 2012 — Whether new second plaintiff had locus standi — First plaintiff filed action on behalf of his son — Whether it was mandatory for first plaintiff to file Forms 188 and 189 pursuant to O 76 r 2 and O 76 r 3(7) of Rules of Court 2012 — Courts of Judicature Act 1964 s 7 — Rules of Court 2012 O 1A, O6 r 1(1), O 15 r 7, O 76 rr 2 & 3(7)

The deceased was one of the victims in the tragedy involving Flight MH17. The deceased's husband ('the defendant') had filed an action ('Suit 435') against Malaysia Airline System Bhd ('MAS') seeking compensation in relation to the said tragedy. The deceased's ex-husband ('the first plaintiff') (on behalf of the deceased's son ('the child')) and the deceased's father ('the original second plaintiff') sought to intervene in Suit 435 but they were not allowed to do so. Subsequently, via mediation, the parties entered into a stakeholder agreement ('the stakeholder agreement') which granted the first plaintiff dan the original second plaintiff the right to initiate an action for the determination of the compensation. Pursuant to the settlement reached between the defendant and MAS in Suit 435, MAS required the parties to sign the form of release and

discharge for settlement and release of all claims in which it was stated that the sum of RM800,000 contributed by MAS as goodwill discretionary payment was deposited into the client's account of the defendant's solicitors as stakeholders for the plaintiffs and the defendant. The plaintiffs then filed the present claim against the defendant pursuant to the stakeholder agreement on the basis that, as heirs and next-of-kin to the deceased, the plaintiffs were entitled to a portion of the compensation sum received from MAS under Suit 435 in accordance with the *faraid* certificate issued by the Negeri Sembilan Shariah High Court on 5 February 2015. The defendant, who had received RM200,000 out of the RM800,000 compensation sum, claimed that the entire amount was his. The defendant further filed a counterclaim against the plaintiffs for his share of the deceased's estate in accordance with the *faraid* certificate. It ought to be noted that the writ and statement of claim were amended to substitute the original second plaintiff with the present second plaintiff who was the deceased's elder brother when the original second plaintiff passed away on 20 August 2020. The defendant had raised the following procedural and technical issues: (a) whether the amended writ was a nullity in light of the Federal Court case of *Sng Hung Meng v Public Utilities Board* [1966] 2 MLJ 25 ('*Sng Hung Meng*'s case') as the plaintiff had failed to comply with mandatory requirement for the writ to be issued in the name of the Yang di-Pertuan Agong; (b) whether the writ and statement of claim could be amended in light of the case of *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2017] MLJU 410 ('*Petra Perdana*'s case') which stated that the amended writ could not be assisted by the saving provisions such as O 1A of the Rules of Court 2012 ('the ROC'); (c) whether the plaintiffs lacked the capacity to bring this action as the plaintiffs failed to obtain letters of administration ('LOA') to the estate of the deceased; and (d) whether it was mandatory to comply with O 76 r 2 and O 76 r 3(7) of the ROC whereby the first plaintiff needed to file Forms 188 and 189 to state whether there was no adverse interest against the minor. The merit-based issues to be determined by the court were as followed: (i) whether the *faraid* certificate was enforceable in the civil court; (ii) whether the plaintiffs had a cause of action under ss 7 and 8 of the Civil Law Act 1956 ('Act 67') given that both the plaintiffs refused to sue MAS for damages for the deceased's death; and (iii) whether the suit was statute-barred pursuant to both the Montreal Convention 1999, which stipulated a two-year limitation period from the date of the incident for a party to initiate action, and s 7(5) of Act 67, which stipulated a three-year limitation period.

Held, dismissing the plaintiffs' claim with costs of RM10,000 to the defendant subject to allocatur, and dismissing the counterclaim with no order as to costs:

(1) There were some concerns about relying on *Sng Hung Meng*'s case. The court held that it was a nullity in that case because it involved a sovereign of a foreign country commanding the attendance of a person before the

A High Court of Singapore. But that was not the situation in the present case. Moreover, O 1A of the ROC stated that in administering the ROC, the court or a judge must take into account the overriding interest of justice rather than technical noncompliance. The court found that despite the requirements of s 7 of the Courts of Judicature Act 1964 ('Act 91') that, amongst others, all writs shall be issued and shall be expressed to be issued by the Chief Judge in the name of the Yang di-Pertuan Agong, and O 6 r 1(1) of the ROC which specified that every writ for the High Court shall be in Form 2 with the specific endorsement of 'The Right Honourable Chief Judge of Malaya/Sabah and Sarawak, in the name of the Yang di-Pertuan Agong', this issue was not fatal to the plaintiffs since it was curable under O 1A of the ROC. The court further found that there was no miscarriage of justice to the defendant and there was no evidence that the rules of court were intentionally disregarded (see paras 25–29).

(2) The court found that *Petra Perdana*'s case did not decide on the validity of the amended writ as proposed by the defendant's issue. Further, s 7 of Act 91 and O 6 r 1(1) of the ROC used the word 'shall', not 'must', as such, pursuant to the decision in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149, the court was convinced that the plaintiffs' non-compliance was purely technical and could be cured rather than being a fundamental or mandatory issue that was fatal to the plaintiffs' case (see paras 31 & 33–35).

(3) It was important to note that the stakeholder agreement expressly granted the first plaintiff and the original second plaintiff the right to initiate this action for the determination of the RM600,000 held by the defendant's solicitors in the stakeholder's account. This arrangement was even agreed to by the defendant. This negated the defendant's argument that the plaintiffs brought this action without obtaining any letters of administration. Further, the present second plaintiff had also obtained an order dated 24 November 2020 from the court pursuant to O 15 r 7 of the ROC which specifically gave a party the right to continue with the suit as if he had been substituted for the original party who had passed away, but the cause of action remained in force. In addition, a grant of letters of administration was also granted to the present second plaintiff on 20 June 2022 in connection with the estate of the original second plaintiff which in effect proven that the present second plaintiff was the administrator of the estate of the original second plaintiff, as such, he was the right person to replace the original second plaintiff (see paras 42 & 44–45).

(4) It was unnecessary for the first plaintiff and his solicitor to file Forms 188 and 189 in court considering that the Ipoh High Court (pursuant to an ex parte application by the first plaintiff) had allowed the first plaintiff to bring the action on behalf of the child since he was a minor. In addition, although the child had reached the age of majority as he turned 18 during the proceedings, the substitution or removal of the litigation guardian was not mandatory. This was because, in advancing this argument that the child had achieved the age of majority and therefore the first plaintiff should have applied to this court to substitute his name with the name of the child, the defendant relied on a piece of document known as 'Rules of Civil Procedure Chapters, Parties and Joinder, Rule 7 — Parties Under Disability, 2021'. The court was unable to verify the origin of this document other than the fact that it was not for Malaysian courts (see paras 48–49).

(5) In the present case, the plaintiffs were merely pursuing their civil rights as stipulated by their claim, but the only thing was that they wanted to distribute such compensation sum according to the distribution portion ordered in the *faraid* certificate. If the court granted the reliefs requested by the plaintiffs, the court did not encroach upon the Shariah Court's jurisdiction or Islamic law in any way because the federal law gave discretion to the court to grant the declarations requested by the plaintiffs. Due to the subject matter of the dispute between the parties, the court found that the civil court (not the Shariah Court) had the necessary jurisdiction to determine the plaintiffs' entitlement under the *faraid* certificate. Based on the above findings, the court concluded that the plaintiffs had a cause of action that could be pursued in this court (see paras 57 & 59–60).

(6) Malaysia Airline System Bhd as the tortfeasor should be the only party to be sued by the plaintiffs, not the defendant, particularly since the plaintiffs refused to begin the action against MAS in the first place after being invited by the defendant to join his intended dependency action against MAS. As a result, the plaintiffs were estopped from bringing this civil suit. The plaintiffs had also failed to plead the essence of their dependency claim. In any case and most importantly, what the defendant received was not the deceased's property that was required to be divided among the heirs or beneficiaries as in a normal estate claim. The money did not form part of the deceased's estate. A dependency claim was what the defendant had received in Suit 435 which was only available to those who could prove that they were the dependent and had acted upon it by initiating the rightful action against MAS. In this case and based on their pleadings, the plaintiffs were not entitled to assert such a claim against the defendant (see paras 70, 72–73 & 75).

(7) This current civil suit against the defendant was only filed more than five years after the tragedy. The court found that article 35 of the Montreal Convention 1999 and s 7(5) of Act 67 had been rightfully invoked and limitation had therefore accrued when the plaintiffs failed to bring the suit against MAS within the limitation period stipulated by those provisions. As far as laches and acquiescence were concerned, it was obvious that the plaintiffs knew that the defendant intended to sue MAS but opted not to do so. Although they alleged, they were entitled to such compensation, there had been no action filed for more than five years (see para 83).

[Bahasa Malaysia summary

Si mati merupakan salah seorang mangsa dalam tragedi yang melibatkan Penerbangan MH17. Suami si mati ('defendan') telah memfailkan tindakan ('Saman 435') terhadap Malaysia Airline System Bhd ('MAS') untuk mendapatkan pampasan berhubung tragedi tersebut. Bekas suami si mati ('plaintif pertama') (bagi pihak anak lelaki si mati ('anak tersebut')) dan bapa si mati ('plaintif kedua yang asal') memohon untuk mencelah dalam Saman 435 tetapi mereka tidak dibenarkan untuk berbuat demikian. Selepas itu, melalui mediasi, pihak-pihak memeterai perjanjian pemegang kepentingan ('perjanjian pemegang kepentingan tersebut') yang memberikan plaintif pertama dan plaintif kedua yang asal hak untuk memulakan tindakan bagi penentuan pampasan. Menurut penyelesaian yang dicapai antara defendan dan MAS dalam Saman 435 tersebut, MAS menghendaki pihak-pihak menandatangani 'form of release and discharge for settlement and release of all claims' yang menyatakan bahawa jumlah RM800,000 yang disumbangkan oleh MAS sebagai bayaran budi bicara muhibah telah didepositkan ke dalam akaun anak guam peguamcara defendan sebagai pemegang kepentingan untuk plaintif-plaintif dan defendan. Plaintif-plaitif kemudiannya memfailkan tuntutan semasa terhadap defendan menurut perjanjian pemegang kepentingan tersebut atas dasar bahawa, sebagai waris dan waris kadim kepada si mati, plaintif-plaintif berhak mendapat sebahagian daripada jumlah pampasan yang diterima daripada MAS di bawah Saman 435 mengikut sijil *faraid* yang dikeluarkan oleh Mahkamah Tinggi Syariah Negeri Sembilan pada 5 Februari 2015. Defendan yang telah menerima RM200,000 daripada jumlah pampasan RM800,000 tersebut mendakwa bahawa keseluruhan jumlah tersebut adalah miliknya. Defendan seterusnya memfailkan tuntutan balas terhadap plaintif-plaintif bagi menuntut bahagian harta pusaka si mati mengikut sijil *faraid* tersebut. Perlu diingatkan bahawa writ dan pernyataan tuntutan telah dipinda untuk menggantikan plaintif kedua yang asal dengan plaintif kedua semasa yang merupakan abang kepada si mati apabila plaintif kedua yang asal meninggal dunia pada 20 Ogos 2020. Defendan telah membangkitkan isu-isu prosedur dan teknikal yang berikut: (a) sama ada writ yang dipinda tersebut adalah terbatal berdasarkan kes Mahkamah Persekutuan *Sng Hung Meng v Public Utilities Board* [1966] 2 MLJ 25; [1966] 1 MLRA 443

('kes *Sng Hung Meng*') kerana plaintif telah gagal mematuhi keperluan mandatori untuk writ tersebut dikeluarkan atas nama Yang di-Pertuan Agong; (b) sama ada writ dan pernyataan tuntutan tersebut boleh dipinda berdasarkan kes *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2017] MLJU 410 ('kes *Petra Perdana*') yang menyatakan bahawa writ yang dipinda tidak dapat dibantu oleh peruntukan kecualian seperti A 1A Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'); (c) sama ada plaintif-plaintif tidak mempunyai kapasiti untuk membawa tindakan ini kerana plaintif-plaintif gagal mendapatkan surat kuasa mentadbir ('SKM') bagi harta pusaka si mati; dan (d) sama ada terdapat kewajipan untuk mematuhi A 76 k 2 dan A 76 k 3(7) KKM 2012 di mana plaintif pertama perlu memfailkan Borang 188 dan 189 untuk menyatakan sama ada tiada kepentingan bertentangan terhadap anak tersebut. Isu-isu yang berasaskan merit yang perlu ditentukan oleh mahkamah adalah seperti berikut: (i) sama ada sijil *faraid* tersebut boleh dikuatkuasakan di mahkamah sivil; (ii) sama ada plaintif-plaintif mempunyai kausa tindakan di bawah ss 7 dan 8 Akta Undang-Undang Sivil 1956 ('Akta 67') memandangkan kedua-dua plaintif enggan menyaman MAS untuk ganti rugi bagi kematian si mati; dan (iii) sama ada saman tersebut dihalang oleh undang-undang menurut kedua-dua Konvensyen Montreal 1999, yang menetapkan tempoh had masa dua tahun dari tarikh kejadian untuk satu pihak memulakan tindakan, dan s 7(5) Akta 67, yang menetapkan tempoh had masa tiga tahun.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos sebanyak RM10,000 kepada defendan tertakluk kepada alokatur, dan menolak tuntutan balas tanpa perintah berkaitan kos:

(1) Terdapat beberapa kebimbangan mengenai sandaran kepada kes *Sng Hung Meng*. Mahkamah memutuskan bahawa ia adalah terbatal dalam kes tersebut kerana ia melibatkan pemerintah negara asing yang memerintahkan kehadiran seseorang di hadapan Mahkamah Tinggi Singapura. Tetapi itu bukan keadaan dalam kes semasa. Selain itu, A 1A KKM 2012 menyatakan bahawa dalam mentadbir KKM 2012, mahkamah atau seorang hakim hendaklah memberi perhatian pada kepentingan utama keadilan dan tidak hanya kepada ketidakpatuhan teknikal. Mahkamah mendapati bahawa walaupun keperluan s 7 Akta Mahkamah Kehakiman 1964 ('Akta 91') bahawa, antara lain, segala apa jua writ hendaklah dikeluarkan dan hendaklah dinyatakan sebagai dikeluarkan oleh Ketua Hakim Negara atas nama Yang di-Pertuan Agong, dan A 6 k 1(1) KKM 2012 yang menyatakan bahawa tiap-tiap writ untuk Mahkamah Tinggi hendaklah dalam Borang 2 dengan pengendorsan khusus 'Yang Arif Ketua Hakim Malaya/Sabah dan Sarawak, atas nama Yang di-Pertuan Agong', isu ini tidak memudaratkan plaintif-plaintif kerana ia boleh dibetulkan di bawah A 1A KKM 2012. Mahkamah seterusnya mendapati bahawa tidak berlaku salah laksana

keadilan kepada defendan dan tiada bukti bahawa kaedah-kaedah mahkamah sengaja diabaikan (lihat perenggan 25–29).

(2) Mahkamah mendapati kes *Petra Perdana* tidak memutuskan berkenaan kesahihan writ yang dipinda seperti yang dicadangkan oleh isu defendan. Selanjutnya, s 7 Akta 91 dan A 6 k 1(1) KKM 2012 menggunakan perkataan 'shall', bukan 'must', oleh itu, menurut keputusan dalam kes *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149, mahkamah yakin bahawa ketidakpatuhan plaintif-plaintif adalah semata-mata teknikal dan boleh dibetulkan dan bukannya menjadi isu asas atau mandatori yang membawa mudarat kepada kes plaintif-plaintif (lihat perenggan 31 & 33–35).

(3) Adalah penting untuk diambil perhatian bahawa perjanjian pemegang kepentingan tersebut secara nyata memberikan plaintif pertama dan plaintif kedua yang asal hak untuk memulakan tindakan ini bagi penentuan RM600,000 yang dipegang oleh peguam cara defendan dalam akaun pihak berkepentingan. Pengaturan ini malah dipersetujui oleh defendan. Ini menafikan hujah defendan bahawa plaintif-plaintif membawa tindakan ini tanpa mendapat apa-apa SKM. Selanjutnya, plaintif kedua semasa juga telah mendapatkan Perintah bertarikh 24 November 2020 daripada mahkamah menurut A 15 k 7 KKM 2012 yang secara khusus memberi hak kepada sesuatu pihak untuk meneruskan saman itu seolah-olah dia telah digantikan dengan pihak asal yang telah meninggal dunia, tetapi kausa tindakan tetap berkuat kuasa. Di samping itu, pemberian surat kuasa mentanbir juga telah diberikan kepada plaintif kedua semasa pada 20 Jun 2022 berkaitan dengan harta pusaka plaintif kedua yang asal yang membuktikan bahawa plaintif kedua semasa adalah pentadbir harta pusaka bagi plaintif kedua yang asal, oleh itu, dia adalah orang yang tepat untuk menggantikan plaintif kedua yang asal (lihat perenggan 42 & 44–45).

(4) Tiada keperluan bagi plaintif pertama dan peguam caranya memfailkan Borang 188 dan 189 di mahkamah memandangkan Mahkamah Tinggi Ipoh (berdasarkan permohonan ex parte oleh plaintif pertama) telah membenarkan plaintif pertama membawa tindakan tersebut bagi pihak anak tersebut memandangkan dia masih di bawah umur. Di samping itu, walaupun anak tersebut telah mencapai umur dewasa apabila dia mencecah 18 tahun semasa prosiding, penggantian atau penyingkiran penjaga litigasi adalah tidak wajib. Ini kerana, dalam menghujahkan bahawa anak tersebut telah mencapai umur dewasa dan oleh itu plaintif pertama sepatutnya memohon kepada mahkamah ini untuk menggantikan namanya dengan nama anak tersebut, defendan bergantung kepada satu dokumen yang dikenali sebagai 'Rules of Civil

Procedure Chapters, Parties and Joinder, Rule 7 — Parties Under Disability, 2021'. Mahkamah tidak dapat mengesahkan asal usul dokumen ini selain daripada fakta bahawa ia bukan untuk mahkamah Malaysia (lihat perenggan 48–49).

(5) Dalam kes ini, plaintif-plaintif hanya ingin mendapatkan hak sivil mereka seperti yang dinyatakan dalam tuntutan mereka, tetapi permasalahan tunggalnya ialah mereka mahu mengagihkan jumlah pampasan tersebut mengikut bahagian pembahagian yang ditetapkan dalam sijil *faraid* tersebut. Sekiranya mahkamah memberikan relif-relif yang dipohon oleh plaintif-plaintif, mahkamah tidak menceroboh bidang kuasa Mahkamah Syariah atau undang-undang Islam dalam apa cara sekalipun kerana undang-undang persekutuan memberi budi bicara kepada mahkamah untuk memberikan pengisytiharan yang dipohon oleh plaintif-plaintif. Disebabkan oleh subjek pertikaian antara pihak-pihak, mahkamah mendapati mahkamah sivil (bukan Mahkamah Syariah) mempunyai bidang kuasa yang diperlukan untuk menentukan kelayakan plaintif-plaintif di bawah sijil *faraid* tersebut. Berdasarkan dapatan-dapatan di atas, mahkamah membuat kesimpulan bahawa plaintif-plaintif mempunyai kausa tindakan yang boleh diteruskan di mahkamah ini (lihat perenggan 57 & 59–60).

(6) Malaysia Airline System Bhd sebagai pelaku tort sepatutnya menjadi satu-satunya pihak yang disaman oleh plaintif-plaintif, bukannya defendan, terutamanya kerana plaintif-plaintif sendiri yang enggan memulakan tindakan terhadap MAS selepas diajak oleh defendan untuk menyertai tuntutan tanggungan yang ingin dibawakan terhadap MAS. Akibatnya, plaintif-plaintif telah dihalang daripada membawa saman sivil ini. Plaintif-plaintif juga telah gagal untuk memplid inti pati tuntutan tanggungan mereka. Walau apa pun dan yang paling penting, apa yang diterima oleh defendan bukanlah harta si mati yang perlu dibahagikan antara waris atau benefisiari seperti dalam tuntutan harta pusaka biasa. Wang tersebut bukan sebahagian daripada harta pusaka si mati. Tuntutan tanggungan adalah apa yang diterima oleh defendan dalam Saman 435 yang hanya tersedia kepada mereka yang boleh membuktikan bahawa mereka adalah tanggungan dan telah bertindak ke atasnya dengan memulakan tindakan yang sah terhadap MAS. Dalam kes ini dan berdasarkan pliding mereka, plaintif-plaintif tidak berhak untuk membawakan tuntutan sedemikian terhadap defendan (lihat perenggan 70, 72–73 & 75).

(7) Saman sivil semasa terhadap defendan ini hanya difailkan lebih lima tahun selepas tragedi tersebut. Mahkamah mendapati perkara 35 Konvensyen Montreal 1999 dan s 7(5) Akta 67 telah digunakan secara sah dan oleh itu had masa telah terakru apabila plaintif-plaintif gagal membawa saman terhadap MAS dalam tempoh had masa yang

ditetapkan oleh peruntukan-peruntukan tersebut. Berkaitan dengan kelengahan dan akuiesens, jelas sekali bahawa plaintif-plaintif mengetahui bahawa defendan berhasrat untuk menyaman MAS tetapi memilih untuk tidak berbuat demikian. Walaupun mereka mendakwa bahawa mereka berhak mendapat pampasan tersebut, tidak ada tindakan yang difailkan selama lebih daripada lima tahun (lihat perenggan 83).]

Cases referred to

Amirthanayaki Kumarasamy v Lembaga Kelayakan Profesion Undang-Undang Malaysia (Legal Profession Qualifying Board Malaysia) [2010] 1 MLJ 656, CA (refd)

Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan [2002] 6 MLJ 134, HC (refd)

Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252; [1989] 1 CLJ Rep 378, HC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149, FC (folld)

Government of Malaysia & Anor v Taib bin Abdul Rahman [1991] 2 MLJ 174, SC (refd)

Ho Yoke Keng v Philip Lau Soo Fock [2022] 3 MLJ 256, CA (refd)

Karisma Saujana Sdn Bhd v Albert a/l Antoni Tass [2008] 8 MLJ 693, HC (refd)

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2006] 4 MLJ 705, CA (distd)

Mohamed Hanif & Anor v Chin Ah Bah [1974] 1 MLJ 128 (refd)

Norwest Holdings Sdn Bhd v Muhibbah Engineering (M) Bhd [2004] 4 MLJ 481, HC (refd)

Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors [2017] MLJU 410, HC (refd)

Sng Hung Meng v Public Utilities Board [1966] 2 MLJ 25; [1966] 1 MLRA 443, FC (refd)

Soda KL Plaza Sdn Bhd v Noble Circle (M) Sdn Bhd [2002] 2 MLJ 367, HC (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(2), (5), 8

Courts of Judicature Act 1964 s 7

Federal Constitution Schedul 9, List II

Rules of Court 2012 O 1A, O 2 r 3, O 6 r 1(1), O 15 r 7, O 59 r 19, O 76 r 2, O 76 r 3(7), Form 2

Specific Relief Act 1950 s 41

Subordinate Courts Rules 1980 (repealed by Rules of Court 2012) Form 1

Fey Aqis Mohd Khairuddin (with Lailatul Fitriah Ma'at and Zaizuraimy Abd Rahim) (Raimy Fuaad Aqis) for the plaintiffs.

Brijnandan Singh Bhar (with Natasha Bhar, Haresh Nair and Rajwinjit Kaur Khalee) (Brijnandan Singh Bhar & Co) for the defendant.

Raja Ahmad Mohzanuddin Shah JC:

PRELIMINARY

[1] The fate of Flight MH17 was tragic. As a nation, we were all affected by MH17's tragedy. A number of other nations were also affected. 298 souls were murdered.

[2] The tragedy involving MH17 is the impetus for the action before me. It tells the story of a dispute between three members of the family of a victim who died in the tragedy. They are parties to this civil suit. A son's mother died, a father's daughter died and a newlywed husband who had been married for just over a year lost his wife. The current dispute has unfortunately prolonged the closure of all parties involved.

[3] In this suit, the plaintiffs seek the balance of compensation sum of RM600,000 as well as accruing interest paid by Malaysian Airline System Bhd ('MAS') in consequence of the victim's death in the MH17 tragedy. The defendant, who has already received RM200,000 out of the RM800,000 compensation sum, claims that the entire amount is his. This is the judgment I am rendering after the trial.

AN OVERVIEW OF THE FACTS

[4] As a result of the tragedy, one Mastura bt Mustafa lost her life.

[5] The late Mastura bt Mustafa ('the deceased') was travelling from Amsterdam Airport Schiphol, Netherlands to Kuala Lumpur International Airport, Malaysia on the fateful date of 17 July 2014. The deceased was one of fifteen cabin crew members aboard Malaysian Airlines Flight MH17 which carried 283 passengers. In tragic circumstances, the flight was never able to reach its destination. As the aircraft was flying over Eastern Ukraine, the Boeing 777–200ER with the registration mark 9M-MRD was shot down by a surface to air missile resulting in the deaths of all those on board.

[6] This case involves several parties that need to be identified.

[7] The first plaintiff is the deceased's ex-husband. Their marriage resulted in the birth of a son on 17 June 2004. The son's name is Muhammad Muhriz bin Marzaidi ('the child'). The first plaintiff and the deceased divorced on 9 January 2013.

[8] The first plaintiff ('PW1') is suing in his capacity as a next friend and guardian of the child as well as in his capacity as litigation representative under an ex parte order issued by the Ipoh High Court on 15 May 2019 in Originating Summons No AA-24NCvC-18805 of 2019. The child was 15 years old when the action was filed on 29 August 2019. When this trial takes place, the child has turned 18. Based on the testimony of PW1, the intent behind this action is to protect the child's rights and interests as a lawful son of the deceased in regard to the child's rightful share of the compensation sum based on the *faraid* certificate issued by the Negeri Sembilan Shariah High Court on 5 February 2015 ('*faraid* certificate').

[9] Originally, the second plaintiff was Mustafa bin Ab Samad, the deceased's father. Following his death on 20 August 2020, the writ and statement of claim were amended to substitute the current second plaintiff ('PW2') as a litigation representative for the late father. PW2 is the deceased's elder brother. As testified by PW2, his late father filed this action in his capacity as the lawful father, heir and dependent of the deceased.

[10] The defendant ('DW1') is the husband of the deceased. They were married on 25 June 2013. The deceased is his second wife. This marriage did not produce any children. In his testimony, DW1 described himself as a religious preacher. In addition, he asserted that he was a dependent of the deceased. According to the defendant, he could not financially support the deceased. The deceased, despite knowing that he could not support her financially, married and provided for him anyway.

[11] The defendant then proceeded to file a civil action at the Kuala Lumpur High Court against MAS and Malaysia Airlines Bhd, registered as Civil Suit No WA-22NCVC-435–07 of 2016 ('Suit 435').

[12] In reaction to the discovery of this civil suit, the plaintiffs sought to intervene, but the court dismissed their application. Mediation was then conducted in hopes of reaching a settlement between the parties. Following this, the first plaintiff, the original second plaintiff and the defendant entered into a stakeholder agreement dated 28 May 2019 which grants the first plaintiff and the original second plaintiff the right to initiate an action for the determination of the RM600,000.

[13] In pursuant to the settlement reached between the defendant and MAS in Suit 435 and having acknowledged the arrangement between the plaintiffs and the defendant made through the stakeholder agreement, MAS required the plaintiffs and the defendant to sign the form of release and discharge for settlement and release of all claims. These forms were signed by the plaintiffs and the defendant on 17 June 2019 and 16 June 2019 respectively. This

document states, amongst others, that the sum of RM800,000 contributed by MAS as goodwill discretionary payment was deposited into the client's account of the defendant's solicitors as stakeholders for the plaintiffs and the defendant.

[14] This claim against the defendant was then filed by the plaintiffs in accordance with the stakeholder agreement on the basis that, as heirs and next-of-kin to the deceased, they are entitled to a portion of the compensation sum received from MAS under Suit 435 in accordance with the *faraid* certificate. The defendant further filed a counterclaim against the plaintiffs for his share of the deceased's estate in accordance with the *faraid* certificate.

ISSUES BEFORE THE COURT

[15] The issues raised before me fall into two categories, the first being procedural and technical issues raised by the defendant in relation to the plaintiffs' claim, and the second being merit-based issues agreed upon by the parties.

[16] On the procedural and technical front, the defendant has raised the following issues in which I have quoted them exactly as proposed by the defendant:

(a) whether the amended writ is a nullity in light of the Federal Court case of *Sng Hung Meng v Public Utilities Board* [1966] 2 MLJ 25; [1966] 1 MLRA 443 as the plaintiff has failed to comply with mandatory requirement for the writ to be issued in the name of the Yang di-Pertuan Agong?

(b) whether the amended writ and statement of claim can be amended in light of the case of *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2017] MLJU 410 which states that the amended writ cannot be assisted by the saving provisions such as O 1A of the Rules of Court 2012 and therefore the writ and statement of claim are a nullity?

(c) whether the citation of the tutelage on the amended writ and statement of claim is bad in law as both the first and second plaintiffs lack of capacity to bring this suit as the first and second plaintiffs failed to obtain letters of administration to the estate of Mastura bt Mustafa?

(d) whether the second plaintiff, Thaib bin Mustafa can proceed with the suit without obtaining letters of administration to administer the estate of Mustafa bin Ab Samad who brought an action against the defendant when he was alive. As such the failure to obtain the letters of administration before amending the tutelage makes it lack of capacity, therefore, it is bad in law? and

(e) whether it is mandatory to comply with O 76 r 2 and O 76 r 3(7) of the Rules of Court 2012 whereby the first plaintiff need to file Forms 188 and 189 to state whether there is no adverse interest against the minor?

[17] As to the merit-based issues to be tried that have been agreed upon by the parties, I have consolidated them into the following three main and material concerns:

(a) whether the *faraid* certificate is enforceable in the civil court regarding the distribution of RM600,000 and therefore gives the plaintiffs the right to bring an action in this court and enables this court to exercise jurisdiction to determine the plaintiffs' entitlement under the *faraid* certificate?

(b) whether the plaintiffs have a cause of action under ss 7 and 8 of the Civil Law Act 1956 given that both plaintiffs refused to sue Malaysian Airline System Bhd for damages for the deceased's death? and

(c) whether the suit has now been statute-barred since both the Montreal Convention 1999, which stipulates a two-year limitation period from the date of the incident for a party to initiate action, and s 7(5) of the Civil Law Act 1956, which stipulates a three-year limitation period, may apply to this case.

PROCEDURAL AND TECHNICAL ISSUES

[18] Interestingly, these issues of procedural and technical defects have not been incorporated as issues for trial.

[19] In spite of the above, considering that the defendant raised these issues at trial, it is nevertheless necessary for me to address them before moving on to the much more pressing concern of merit-based issues.

Whether the amended writ is a nullity in light of the Federal Court case of Sng Hung Meng v Public Utilities Board [1966] 2 MLJ 25; [1966] 1 MLRA 443 as the plaintiff has failed to comply with mandatory requirement for the writ to be issued in the name of the Yang di-Pertuan Agong?

[20] The defendant argues that the amended writ does not state that it was issued by the Chief Judge of Malaya on behalf of the Yang di-Pertuan Agong, therefore it constitutes a nullity rather than an irregularity that can be rectified.

[21] A case that the defendant cites for support is *Sng Hung Meng v Public Utilities Board* [1966] 2 MLJ 25; [1966] 1 MLRA 443 which was decided by the Federal Court of Singapore. In delivering the decision on the main issue before the Federal Court, Wee Chong Jin (Singapore) CJ concluded as follows

at p 449:

> In my opinion s 6 of the 1965 Act has completely divested all sovereignty, jurisdiction, power and authority, executive or otherwise vested in the Yang di-Pertuan Agong of Malaysia in respect of Singapore ie the totality of all his powers, sovereign or otherwise in respect of Singapore and vested them in the Yang di-Pertuan Negara of Singapore. One of such powers is the power to command the appearance of a subject or a person within his territory to appear before his Courts. It follows in my opinion, that until the Legislature of Singapore after 9 August 1965, specifically enacts that this particular power vests in someone other than the Yang di-Pertuan Negara of Singapore, all writs of summons issued out of the High Court must be issued in the name of the Yang di-Pertuan of summons issued out of the High Court of Singapore in the name of a sovereign of a foreign country commanding the appearance of a person before the high Court of Singapore is a bad writ amounting to a nullity unless there is a clear enactment by the Legislature of Singapore enabling a writ of summons to be so issued.
>
> It follows that in my opinion the writ of summons in the case before us is not a mere irregularity but is a nullity, the issue of a writ in the name of a foreign sovereign is an error fundamental to the whole proceedings and for all these reasons I would dismiss the appeal with costs.

[22] The defendant further argues that the Court of Appeal erred in law by failing to appreciate and consider *Sng Hung Meng v Public Utilities Board* [1966] 2 MLJ 25; [1966] 1 MLRA 443. This is not something that I am able to discuss. To my mind, however, it is significant to note that the Court of Appeal had, when dismissing the defendant's appeal against the High Court's decision to dismiss his striking out application, directed the trial to proceed so that the High Court could consider issues pertaining to the plaintiffs' entitlement under the law to claim the balance of the settlement sum paid by MAS. This was made despite the Court of Appeal having considered the current technical issue along with some other procedural issues. It appears that the decision by the Court of Appeal directly related to the merit-based issues raised by the parties.

[23] Now, returning to the defendant's argument on *Sng Hung Meng v Public Utilities Board* [1966] 2 MLJ 25; [1966] 1 MLRA 443, he forcefully asserts that based on this authority, it clearly states that it is mandatory that the amended writ be issued in the name of the Yang di-Pertuan Agong and that failing to comply with this requirement will result in a nullity of the amended writ.

[24] From my perspective, there are some concerns about relying on *Sng Hung Meng v Public Utilities Board* [1966] 2 MLJ 25; [1966] 1 MLRA 443. This is particularly so since the appeal before the Federal Court of Singapore involved an issue stemming from the sudden separation of Singapore from Malaysia on 9 August 1965. In that case, there was a writ issued by the plaintiff

which was specifically endorsed with 'The Honourable Dato' Wee Chong Jin, PMN CJ of Singapore, in the name and on behalf of His Majesty the Yang di-Pertuan Agong'.

[25] Basically, what happened was that as a result of the separation, the Yang di-Pertuan Agong no longer held the position of Supreme Head of Singapore and his sovereignty along with its connected rights and responsibilities were vested in the Yang di-Pertuan Negara as Singapore's Head of State. Wee Chong Jin (Singapore) CJ held that it was a nullity in that case because it involved a sovereign of a foreign country commanding the attendance of a person before the High Court of Singapore. As far as I am concerned, this is not the situation that confronts me. Moreover, O 1A of the Rules of Court of 2012 ('the ROC'), which states that in administering the ROC, the court or a judge must take into account the overriding interest of justice rather than technical noncompliance, was not yet enacted.

[26] I further find that despite the requirements of s 7 of the Courts of Judicature Act 1964 ('the CJA') that, amongst others, all writs shall be issued and shall be expressed to be issued by the Chief Judge in the name of the Yang di-Pertuan Agong, and O 6 r 1(1) of the ROC which specifies that every writ for the High Court shall be in Form 2 with the specific endorsement of 'The Right Honourable Chief Judge of Malaya/Sabah and Sarawak, in the name of the Yang di-Pertuan Agong', this issue is not fatal to the plaintiffs since it is curable under O 1A of the ROC.

[27] Nevertheless, I must be clear that, despite such findings, I do not condone any procedural or technical errors that constitute fundamental breaches of the ROC. My most critical concern, in this case, is that given the very specific facts presented to me as discussed earlier, I must exercise my discretion to ensure that the overriding interest of justice will prevent dismissal or striking out of the claim on this issue, especially after a full trial has been conducted and the merits of the case have been heard.

[28] The plaintiffs' case also appears to be genuine to me and there has been no miscarriage of justice here to the defendant because he has the fullest opportunities of advancing and defending his case with full force of facts and laws (see also O 2 r 3 of the ROC, *Karisma Saujana Sdn Bhd v Albert a/l Antoni Tass* [2008] 8 MLJ 693, *Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan* [2002] 6 MLJ 134, *Norwest Holdings Sdn Bhd v Muhibbah Engineering (M) Bhd* [2004] 4 MLJ 481 and *Amirthanayaki Kumarasamy v Lembaga Kelayakan Profesion Undang-Undang Malaysia (Legal Profession Qualifying Board Malaysia)* [2010] 1 MLJ 656).

[29] Furthermore, I find no evidence that the rules of court were

intentionally disregarded unlike in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149.

Whether the amended writ and statement of claim can be amended in light of the case of Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors [2017] MLJU 410 which states that the amended writ cannot be assisted by the saving provisions such as O 1A of the Rules of Court 2012 and therefore the writ and statement of claim are a nullity?

[30] The defendant argues that as a result of the case of *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2017] MLJU 410, in which it states that the amended writ cannot be saved by O 1A of the ROC, it produces the effect of nullifying both the writ and statement of claim since they cannot be amended in the first place. Additionally, the defendant argues that the Court of Appeal erred in failing to consider this issue as submitted by the defendant at the Court of Appeal considering that the plaintiffs failed to comply with the mandatory laws and the Registrar of the High Court of Malaya's Circular No 2 of 2011 (teste for writ of summons (amendment)) that also had the same mandatory effect; thus, the plaintiffs' writ should have been dismissed by the Court of Appeal as null and void.

[31] Starting off, the High Court case of *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2017] MLJU 410 did not decide on the validity of the amended writ as proposed by the defendant's issue. In that case, the High Court was presented with the question of whether compliance with the one-month period to obtain directions on damages assessment as stipulated by the ROC was mandatory in nature or whether the plaintiffs failure to comply with that was fatal and not merely a technical matter that did not nullify the plaintiffs action.

[32] Examining this issue more closely, it appears that this issue is an extension of the first issue and my view is that I will have to decide it based on how I would have decided on the first issue.

[33] After determining the above, I conclude that such non-compliance is purely technical and can be cured rather than being a fundamental or mandatory issue that is fatal to the plaintiffs' case.

[34] Further supporting this argument, I observe that the High Court in *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2017] MLJU 410 had relied upon *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149, during which

Zaki Azmi CJ observed that the word 'must' is rarely used in legislation because the more common word used is 'shall' and thus it is intended to ensure that it is fully complied with and there is no discretion to be given regarding compliance. According to His Lordship, the word 'must' is more powerful than the word 'shall'.

[35] Coming back to our case, it appears that s 7 of the CJA and O 6 r 1(1) of the ROC use the word 'shall', not 'must'. As a result of relying on *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149, I am further convinced that the plaintiffs' lack of compliance is merely a technical issue that will not nullify their claim.

[36] Referring to the defendant's reliance on *Soda KL Plaza Sdn Bhd v Noble Circle (M) Sdn Bhd* [2002] 2 MLJ 367, where the plaintiff failed to include the word 'summons' as stipulated in Form 1 of the Subordinate Courts Rules 1980 ('the SCR'), the summons in that case was ruled invalid because the title 'summons' had been omitted. The High Court found that this was a serious breach of the SCR since 'shall' or 'must' connoted a mandatory requirement where discretion could not be exercised if the requirements were not met. On this issue, I believe the High Court's decision was made on 13 December 2001, when O 1A of the ROC had not been introduced until 16 May 2002, causing the decision to be devoid of its benefit. Furthermore, the Federal Court has already addressed the issue of the nature and effect of the words 'shall' and 'must' in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149.

Whether the citation of the tutelage on the amended writ and statement of claim is bad in law as both first and second plaintiffs lack of capacity to bring this suit as the first and second plaintiffs failed to obtain letters of administration to the estate of Mastura bt Mustafa?

Whether the second plaintiff, Thaib bin Mustafa can proceed with the suit without obtaining letters of administration to administer the estate of Mustafa bin Ab Samad who brought an action against the defendant when he was alive. As such the failure to obtain the letters of administration before amending the tutelage makes it lack of capacity, therefore, it is bad in law?

[37] Due to their interconnectedness, the defendant has grouped these two issues together.

[38] The defendant argues that it is a matter of trite law that if the next of kin wishes to sue on behalf of an estate after a person passes away, the next of kin

must first obtain letters of administration. In such a scenario, if a party brings an action as the administrator of a deceased person's estate without actually obtaining letters of administration, the court will have this party's writ struck out for lack of cause of action (see *Ho Yoke Keng v Philip Lau Soo Fock* [2022] 3 MLJ 256 and *Mohamed Hanif & Anor v Chin Ah Bah* [1974] 1 MLJ 128).

[39] According to the defendant, the original second plaintiff, who is the father of the deceased, passed away on 20 August 2020 and upon his death, PW2 brought the claim under the estate of the late father. Despite the fact that the deceased has been dead for more than two years, PW2 has yet to take any active steps to obtain letters of administration for his late father's estate. Further, PW2 obtained only an order from the Small Estate Distribution Section of the Department of the Director General of Lands and Mines to handle the estate of his late father. In spite of this, the letters of administration only cover a few other properties and do not specifically authorise PW2 to bring an action on behalf of his late father's estate. The situation is particularly serious when the plaintiffs are claiming an estate claim rather than a dependency claim as the defendant further contends.

[40] As for whether the plaintiffs could proceed without letters of administration, I conclude that they have locus standi to bring and continue this action.

[41] As mentioned earlier, the parties have entered into a stakeholder agreement dated 28 May 2019 containing the following important clauses, amongst others:

(a) cl 1 — The Plaintiff and Intervening-Parties agree for MAS to release the sum of RM800,000 into the Clients' account of MESSRS Brijnandan Singh Bhar & Co upon the signing of Form of Release and Discharge for Settlement and Release of All Claims by the Plaintiff and the Intervening-Parties;

(b) cl 2 — The Plaintiff and Intervening-Parties agree that out of the sum RM800,000, the sum of RM200,000 is to be released and remitted forthwith to the Plaintiff absolutely;

(c) cl 3 — The Plaintiff and Intervening-Parties hereby agree that the balance of the settlement sum amounting to RM600,000 shall be placed in a profit bearing Syariahcompliant fixed deposit account maintained at Maybank Islamic Bank and held by the Solicitors as Stakeholder;

(d) cl 4 — The Plaintiff and Intervening-Parties hereby agree that the Intervening-Parties shall commence proceedings, if any, in the High Court of Malaya at Kuala Lumpur for the determination of the RM600,000 held in the Stakeholder's account and that such

proceedings, if any, shall be commenced within a period of three (3) months from the date of the Form of Release and Discharge for Settlement and Release of All Claims by the Plaintiff and the Intervening-Parties;

(e) cl 5 — Both the Plaintiff and Intervening-Parties hereby agree that the said sum of RM600,000 together with all profits shall be released by the Solicitors upon occurrence of any of the following events:

(i) cl 5 (a) — The final determination is made in such proposed proceedings in the High Court of Malaya at Kuala Lumpur by Intervening-Parties against the Plaintiff including any ensuing Appeals in accordance with the order of the High Court or any order of the Appellate Courts as the case may be; or

(ii) cl 5 (b) — In the event no such proposed proceedings, if any, are commenced by the Intervening-Parties within a period of three months from the date of the Form of Release and Discharge for Settlement and Release of All Claims by the Plaintiff and the Intervening-Parties, then the Solicitors unconditionally undertake to release the sum of RM600,000 to the Plaintiff forthwith.

(f) cl 6 — This Agreement entered between the Plaintiff and Intervening-Parties does not in any way signify the Plaintiffs consent, agreement and/or recognition to the entitlement of the Intervening-Parties to any share of the full and final settlement sum paid by Malaysian Airlines System Berhad (MAS) in the Civil Suit No WA-22NCVC-435–07/2016 filed by the Plaintiff solely in his capacity as the husband and dependent of the late Mastura bt Mustafa.

[42] It is important to note that this stakeholder agreement expressly grants the first plaintiff and the original second plaintiff the right to initiate this action for the determination of the RM600,000 held by the defendant's solicitors in the stakeholder's account. This arrangement was even agreed to by the defendant. This negates the defendant's argument that the plaintiffs brought this action without obtaining any letters of administration.

[43] The next point to note is that the first plaintiff has, in fact, obtained an order from the Ipoh High Court to act as litigation representative on behalf of the child.

[44] I further find that the second plaintiff has also obtained an order dated 24 November 2020 from this court pursuant to O 15 r 7 of the ROC. Order 15 r 7 of the ROC specifically gives a party the right to continue with the suit as if he had been substituted for the original party who has passed away but the cause of action remains in force. This will ensure that all matters disputed in the

suit will be adjudicated and resolved effectively and completely.

[45] As mentioned above, a grant of letters of administration was also granted to PW2 on 20 June 2022 in connection with the estate of his late father. In spite of the fact that this action is not specifically mentioned in the grant of letters of administration, it cannot be disputed that he is the administrator of his late father's estate. Therefore, he is the right person to replace the original second plaintiff (see *Government of Malaysia & Anor v Taib bin Abdul Rahman* [1991] 2 MLJ 174).

[46] In addition, it also appears that when the defendant initiated Suit 435 on 15 July 2016, he was also not issued with the letters of administration, which was only issued to him on 6 April 2017.

Whether it is mandatory to comply with O 76 r 2 and O 76 r 3(7) of the Rules of Court 2012 whereby the plaintiff needs to file Forms 188 and 189 to state whether there is no adverse interest against the minor?

[47] The defendant argues that the child was a minor and was only 15 years old at the time the suit was filed. Accordingly, O 76 r 2 and O 76 r 3(7) of the ROC require the first plaintiff and his solicitor to file Forms 188 and 189 in court. Prior to discussing this issue, I am reproducing O 76 r 2 and O 76 r 3(7) of the ROC for convenience of reference:

> 2 Person under disability shall sue by litigation representative (O 76, r 2)
>
> (1) A person under disability may not bring, make a claim in, defend, make a counterclaim in, or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his litigation representative.
>
> (2) Subject to the provisions of these Rules, anything which in the ordinary conduct of any proceedings is required or authorized by a provision of these Rules to be done by a party to the proceedings shall or may, if the party is a person under disability, be done by his litigation representative.
>
> (3) A litigation representative of a person under disability shall act by a solicitor.
>
> Appointment of litigation representative (O 76, r 3)
>
> (6) Except where the litigation representative of a person under disability has been appointed by the Court —
>
> (a) the name of any person shall not be used in a cause or matter as litigation representative of a person under disability;
>
> (b) an appearance shall not be entered in a cause or matter for a person under disability; and

A (c) a person under disability shall not be entitled to appear by his litigation representative on the hearing of an originating summons which has been served on him,

unless and until the documents listed in paragraph (7) have been filed in the Registry.

B (7) The documents referred to in paragraph (6) are the following:

(a) a written consent in Form 188 to be litigation representative, of the person under disability in the cause or matter in question given by the person proposing to be such litigation representative;

C (b) where a person proposing to be such litigation representative of the person under disability, being a patient, is authorized under the Act to conduct the proceedings in the cause or matter in question in the name of the patient or on his behalf, an office copy, sealed with the seal of the Court, of the order or other authorization made or given under the Act by virtue of which he is so authorized; and

D (c) except where the person proposing to be such litigation representative of the person under disability, being the patient, is authorized as mentioned in subparagraph (b), a certificate in Form 189 made by the solicitor for the person under disability certifying —

E (i) that he knows or believes, as the case may be, that the person to whom the certificate relates is a minor or a patient, giving (in the case of a patient) the grounds of his knowledge or belief; and

F (ii) where the person under disability is a patient, that there is no person authorized as aforesaid; and

(iii) that the person so named has no interest in the cause or matter in question adverse to that of the person under disability.

G **[48]** For this issue, I find it unnecessary for the first plaintiff and his solicitor to file those two forms in court. Those forms will only be necessary if the first plaintiff has not been appointed by the court as litigation representative. It is clear from the case before me that the Ipoh High Court has actually allowed the first plaintiff to bring the action on behalf of the child since he was a minor.

H

[49] I also find that although the child has reached the age of majority as he turned 18 during the proceedings, the substitution or removal of the litigation guardian is not mandatory. This is because, in advancing this argument that the child has achieved the age of majority and therefore PW1 should have applied to this court to substitute his name with the name of the child, the defendant relies on a piece of document known as Rules of Civil Procedure Chapters, Parties and Joinder, Rule 7 — Parties Under Disability, 2021. I am unable to verify the origin of this document other than the fact that it is not for Malaysian

I

courts. I would guess that it originated in Canada since the legal text on this chapter was prepared by a Canadian law firm.

MERIT-BASED ISSUES

[50] Now that the above procedural and technical issues have been dealt with, I must move on to the more serious issues facing the parties.

Whether the faraid certificate is enforceable in the civil court regarding the distribution of RM600,000 and therefore gives the plaintiffs the right to bring an action in this court and enables this court to exercise jurisdiction to determine the plaintiffs' entitlement under the faraid certificate?

[51] As a first step, I am required to determine whether the *faraid* certificate is enforceable in the civil court when referring to the distribution of RM600,000, and if so, does this court have jurisdiction to determine the plaintiffs' entitlement under the *faraid* certificate pursuant to the plaintiffs' existing cause of action?

[52] My analysis of the plaintiffs' statement of claim reveals that in formulating their claim, the plaintiffs are primarily seeking their entitlement under the *faraid* certificate. As a result, they are asking for the following reliefs from the court:

(a) a declaration that the child and the late father are the deceased's legal heirs and are therefore entitled to RM600,000;

(b) a declaration that the RM600,000 paid by MAS is being held in a stakeholder's account by the defendant's solicitors as a trust for the purpose of distribution to the child and the late father in accordance with the *faraid* certificate;

(c) a declaration that the first plaintiff holds title to the compensation money as a guardian for the child;

(d) a declaration requiring the defendant's solicitors to release the sum of RM600,000 within 14 days from the date of the order; and

(e) costs.

[53] The plaintiffs claim that, under s 41 of the Specific Relief Act 1950 ('the SRA'), they are entitled to such declarations of their entitlement to such sum of RM600,000 and this action has been based on three documents:

(a) the stakeholder agreement;

(b) the form of release and discharge for settlement and release of all claims; and

(c) the *faraid* certificate dated 5 February 2015,

as well as the relevant terms and conditions associated with them.

[54] In s 41 of the SRA, the following is provided for:

> 41 Discretion of court as to declaration of status or right
>
> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[55] Based on this provision, the plaintiffs argue that this court has jurisdiction over this case as it is an ab initio case that does not fall under the Shariah Court's strict jurisdiction. This is because this action involves determining the plaintiffs' entitlements and rights to the declarations prayed for as well as the interpretation of the relevant laws pertaining to such entitlements and rights including the distribution of the amount in dispute.

[56] Additionally, the plaintiffs argue that the defendant should have instituted Suit 435 not only for himself, but also for the plaintiffs, in accordance with s 7(2) of the Civil Law Act 1956 ('the CLA') but failed to do so. This means that the plaintiffs are entitled to file this current suit since MAS also intended the compensation money for the plaintiffs, not only the defendant. Moreover, the plaintiffs claim that, even though the intervener application was dismissed, Azizul Azmi Adnan J (as His Lordship then was) had initiated the mediation process and recommended that the plaintiffs file a new suit for a final determination of the plaintiffs' entitlement to the balance compensation sum. The legal action was prompted by this.

[57] In this regard, I find that this court has the necessary jurisdiction to determine the plaintiffs' entitlement under the *faraid* certificate. With that said, it seems to me that there is no merit to the defendant's argument that the *faraid* certificate does not apply in a civil court allegedly because it involves the issue surrounding Islamic law. It appears to me that due to the subject matter of the dispute between the parties as highlighted above, this civil court is appropriately suited to handle this dispute. It is not within the jurisdiction of the Shariah Court to deal with this matter as further suggested by the defendant.

[58] On this score, the authorities of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2006] 4 MLJ 705 and List II — State List of the Federal Constitution, relied upon by the defendant, are therefore irrelevant in this case.

The case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2006] 4 MLJ 705 is distinguishable since its subject matter was a dispute involving *inter vivos* or *hibah* gifts between Muslims, which was not a probate and administration matter, thus falling under the Shariah Court's jurisdiction. It is for this reason that List II — State List of the Federal Constitution, which determines matters regarding Islamic law, fell within that case, thereby excluding civil court jurisdiction.

[59] As such, if the plaintiffs apply for the issuance of a *faraid* certificate in a civil court, then the authority in that case would govern the civil court. However, this is not the case here. The plaintiffs are merely pursuing their civil rights as stipulated by their claim but the only thing is that they want to distribute such compensation sum according to the distribution portion ordered in the *faraid* certificate. Similarly, if I grant the reliefs requested by the plaintiffs, I do not encroach upon the Shariah Court's jurisdiction or Islamic law in any way. The federal law gives me discretion to grant the declarations requested by the plaintiffs.

[60] Based on the above findings, I conclude that the plaintiffs have a cause of action that can be pursued in this court.

Whether the plaintiffs have a cause of action under ss 7 and 8 of the Civil Law Act 1956 given that both plaintiffs refused to sue Malaysian Airline System Bhd for damages for the deceased's death?

[61] My next concern is whether the plaintiffs have a cause of action under ss 7 and 8 of the CLA given that both plaintiffs refused to sue MAS for damages for the deceased's death.

[62] In this regard, the plaintiffs argue that their cause of action is related to their claim as legal heirs and dependents of the deceased as allegedly recognised by MAS in form of release and discharge for settlement and release of all claims signed by the first plaintiff, the original second plaintiff and the defendant. As a result of this document, the plaintiffs assert that they are entitled and have absolute rights to receive the goodwill discretionary payment made by MAS.

[63] Aside from that, the plaintiffs are also claiming that the defendant failed to institute the suit on their behalf when it filed Suit 435. Considering this aspect, I find that the plaintiffs are taking an absurd and inaccurate position based on the surrounding facts and their current position. It appears to me that the plaintiffs have been given the opportunity to join Suit 435 but have refused to do so. However, as the case progressed towards a settlement, the plaintiffs commenced an action to intervene. The following findings have led me to this conclusion.

[64] The plaintiffs' evidence indicates that in July 2017, they discovered that the defendant had filed Suit 435. Their examination of the said civil suit revealed that the defendant filed the action as the husband and dependent of the deceased as if he were the only heir and dependent of the deceased even though the deceased had a child and a father. Moreover, the plaintiffs claim that the filing of the action did not comply with the *faraid* certificate's distribution order due to the defendant's claim for the entire sum.

[65] As I analysed the evidence presented by the defendant, I discovered another set of vital facts. The defendant claims that prior to filing Suit 435, the defendant through his solicitors, Messrs Brijnandan Singh Bhar & Co, had written to the second plaintiff in a letter dated 28 July 2015 informing him that the defendant intended to seek compensation settlement with MAS and file a civil suit against the airline. This letter was sent in order to inquire whether the deceased's parents and child intended to file an action against MAS in connection with the MH17 incident under the Civil Law Act 1956. Moreover, it was informed to the second plaintiff that if the defendant's solicitors did not receive a written reply within 14 days from the second plaintiff, they would be assumed to be waiving their rights under the Civil Law Act 1956.

[66] In a reply letter sent to the defendant's solicitors dated 17 August 2015, Messrs Mohd Khairul Masni & Associates, the Shariah solicitors appointed by the second plaintiff to represent the family, explained that the deceased's family was not interested in participating in the defendant's civil suit and expressed their disagreement with the defendant's intent.

[67] It further appears to me that after almost four years since the MH17 tragedy occurred and almost two years since Suit 435 was filed, the plaintiffs suddenly filed an application to intervene requesting that some portion of the compensation sum be distributed to the plaintiffs pursuant to the *faraid* certificate. The plaintiffs' application to intervene in Suit 435, however, was dismissed by Mohd Firuz Jaffril J on 14 September 2018. His Lordship ruled that Suit 435 was not an estate claim but a dependency claim. This decision has not been appealed by the plaintiffs. As a result, the decision made by His Lordship in Suit 435 is final and binding on the plaintiffs.

[68] It is further revealed during the trial that since the filing of Suit 435, the parties in that suit have been in negotiations for about two years before the defendant finally agreed to accept MAS' full and final settlement offer.

[69] Moving on, due to the plaintiffs' continued demands for the compensation sum to be distributed to the plaintiffs as the legal heirs, the matter was referred to Azizul Azmi Adnan J (as His Lordship then was) for

mediation. To address this issue, His Lordship suggested that the plaintiffs file a separate civil suit against the defendant if they had a claim over the compensation money.

[70] In light of the above findings, I conclude that MAS should be the only party to be sued by the plaintiffs, not the defendant, particularly since the plaintiffs refused to begin the action against MAS in the first place after being invited by the defendant to join his intended dependency action against MAS. As a result, the plaintiffs are estopped from bringing this civil suit. The plaintiffs are also conflicted when they claim that the defendant failed to comply with s 7(2) of the CLA by not initiating the action in Suit 435 on their behalf whereas the defendant's solicitor's had, in fact, issued the letter dated 28 July 2015 clearly stating his intentions on suing MAS.

[71] Furthermore, the next thing I find when reading the re-amended statement of claim is that not only does the plaintiffs not allege a dependency claim against the defendant but it appears as if the plaintiffs are primarily suing for their entitlement under the *faraid* certificate. Basically, the plaintiffs allege that this current suit is filed in order to obtain their rights as heirs of the deceased based on the deceased's estate so that it can be distributed according to the *faraid* certificate. The plaintiffs only pleaded to the extent that the defendant initiated the suit against MAS in Suit 435 in his capacity as the deceased's husband and dependent.

[72] As a result of the evidence I have been presented with, I conclude that the plaintiffs have therefore failed to plead the essence of their dependency claim, making them bound by their own pleadings. Moreover, I am of the opinion that the plaintiffs cannot enter the suit through the back door in order to reap the fruits of that successful negotiation in Suit 435 since they have foregone such rights in the first place by refusing to file the suit together with the defendant and only by sitting sideline.

[73] In any case and most importantly, what the defendant received is not the deceased's property that is required to be divided among the heirs or beneficiaries as in a normal estate claim. The money does not form part of the deceased's estate. A dependency claim was what the defendant had received in Suit 435 which is only available to those who can prove that they are the dependent and had acted upon it by initiating the rightful action against MAS. In this case and based on their pleadings, the plaintiffs are not entitled to assert such a claim against the defendant.

[74] In addition, even the Court of Appeal, in its broad grounds, recognised that it was clear from the plaintiffs' statement of claim that they were relying on the *faraid* certificate to establish their claims.

[75] This being the case, I further agree with the defendant's argument that MAS, not the defendant, was the tortfeasor the plaintiffs should have pursued.

Whether the suit has now been statute-barred since both the Montreal Convention 1999, which stipulates a two-year limitation period from the date of the incident for a party to initiate action, and s 7(5) of the Civil Law Act 1956, which stipulates a three-year limitation period, may apply to this case

[76] The question of whether the suit is now statute-barred should also be examined since the Montreal Convention 1999 stipulates a two-year limitation period from the date of the incident for a party to initiate action as well as s 7(5) of the CLA which stipulates a three-year limitation period.

[77] Apart from the limitation issue, the defendant also argues that laches and acquiescence bar the plaintiffs' action.

[78] According to the defendant, the tragedy occurred on 17 July 2014 but the plaintiffs only filed the civil suit on 29 August 2019. Aside from that, the defendant here is not the tortfeasor who caused the deceased's death and therefore, this suit has also been filed against the wrong party. The following was confirmed during PW1's cross-examination:

> DBS: So, dengar baik-baik. So, hak itu you kena ambil dan MAS, bukan Affendi.
>
> PW1: Ya, betul daripada MAS.

[79] In order to address this issue, I will refer to some relevant authorities.

[80] In accordance with article 35 of the Montreal Convention 1999, the following is provided:

> Article 35 — Limitation of Actions
>
> 1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

[81] In addition to this, s 7(5) of the CLA provides the following:

> Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased.

[82] In addressing the issues of laches and acquiescence, there is nothing better than referring to Peh Swee Chin J's (as His Lordship then was) judgment in *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252; [1989] 1 CLJ Rep

378 where His Lordship's observations at p 254 (MLJ); p 381 (CLJ) are most relevant to the case and facts before me.

> The word 'laches' is one of the most over-worked words in legal arguments before the Courts and it does not seem to have been fully appreciated for its nature. It means definitely something more than a mere delay, it means such delay amounting to acquiescence. Here the word acquiescence is not quite the same acquiescence as used in equitable estoppel, where, generally a plaintiff stands by watching a violation of his right in progress and keeping silence, but here, there is a completed violation of rights and a plaintiff has become aware of it. He either assents to it, or his delay in asserting his right has been so long as to give rise to an inference of such assent. Regard must be had to the charge in a defendant's position which has resulted from a plaintiffs delay in bringing an action. On the facts in the instant case, the plaintiffs had not been guilty of laches in the sense just stated, though I had a suspicion that the Counsels were speaking merely of mere inordinate delay.

[83] Getting back to the subject at hand, the above circumstances lead me to conclude that article 35 of the Montreal Convention 1999 and s 7(5) of the CLA have been rightfully invoked and limitation has therefore accrued when the plaintiffs failed to bring the suit against MAS within the limitation period stipulated by those earlier provisions. This current civil suit against the defendant was only filed more than five years after the tragedy, so it also falls outside the limitation period. As far as laches and acquiescence are concerned, it is obvious that the plaintiffs knew that the defendant intended to sue MAS but opted not to do so. In spite of the fact that they allege they are entitled to such compensation, there has been no action filed for more than five years.

[84] In light of my findings above, I find it unnecessary to address the defendant's other supplementary issues.

CONCLUSION

[85] For the foregoing reasons, the plaintiffs' claims are dismissed with costs subject to allocatur.

[86] As far as costs are concerned, I am hesitant to impose a high award of costs due to the nature of the claim and the tragedy that affected all parties before me, particularly the child. Aside from that, they are also related through the deceased. In exercising my discretion under O 59 r 19 of the ROC, I am thus awarding costs of RM10,000 to the defendant.

[87] In regard to the counterclaim, I acknowledge the defendant's position that if the main claim is dismissed by me, the defendant will no longer pursue his counterclaim. Taking my decision into consideration, the counterclaim is dismissed with no order as to costs.

A *Plaintiffs' claim dismissed with costs of RM10,000 to defendant subject to allocatur; counterclaim dismissed with no order as to costs.*

Reported by Dzulqarnain Ab Fatar

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